FILED
APR 22 1974
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 73-1576

RONNIE H. DISHEROON,
Petitioner,

vs.

THE STATE OF OKLAHOMA,
Respondent.

No. F-73-305

RONNIE HAROLD DISHEROON,
Petitioner,

vs.

THE STATE OF OKLAHOMA,
Respondent.

No. F-73-316

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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No. F-73-316

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

The Petitioner respectfully prays that a writ of certiorari issue to review the judgments of the Court of Criminal Appeals of the State of Oklahoma entered in *Disheroon* v. *State of Oklahoma*, (number F-73-305) (judgment entered January 23, 1974); and *Disheroon* v. *State of Oklahoma*, (number F-73-316) (judgment entered February 20, 1974). Review of each decision is sought pursuant to Supreme Court Rule 23-5 for the reason that each case involves identical or substantially similar questions of law.

OPINIONS BELOW

Disheroon v. *State of Oklahoma* (No. F-73-305)

The divided opinion of the Court of Criminal Appeals of the State of Oklahoma in *Disheroon* v. *State of Oklahoma* (No. F-73-305) is reported at 45 Okla. B. Jo. 334 (Okl. Cr. 1974), 518 P.2d 892 (Okl. Cr. 1974) (Appendix A).

Disheroon v. *State of Oklahoma* (No. F-73-316)

The divided opinion of the Court of Criminal Appeals of the State of Oklahoma in *Disheroon* v. *State of Oklahoma* (No. F-73-316) is reported at 45 Okla. B. Jo. 531 (Okl. Cr. 1974), ____P.2d____ (Okl. Cr. 1974) (Appendix B).

JURISDICTION

The Court of Criminal Appeals of the State of Oklahoma entered judgment in *Disheroon* v. *State of Oklahoma* (No. F-73-305) on January 23, 1974; and in *Disheroon* v. *State of Oklahoma* (No. F-73-316) on February 20, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257 (3) and Supreme Court Rule 22 (1).

QUESTIONS PRESENTED

1. Was the receipt and admission of testimony of a material witness from the preliminary hearing a denial of petitioner's right of confrontation and due process as guaranteed by the Constitution of the United States?

2. Did the Court of Criminal Appeals of the State of Oklahoma affirm the conviction of the petitioner "in a way probably not in accord with applicable decisions of this court"?

3. Did the prosecution of these cases as separate actions violate every standard of fairness and justice and thereby result in a denial of petitioner's due process as guaranteed by the Constitution of the United States?

4. Did the prosecution of these cases as separate actions twice put the petitioner in jeopardy of life or limb for the same offense?

CONSTITUTION AND STATUTES INVOLVED

The applicable constitutional and statutory provision involved are in pertinent part set forth as follows:

1. United States Constitution, 5th Amendment:

   No person...shall...be subject for the same offense to be twice put in jeopardy of life or limb.

2. United States Constitution, 6th Amendment:

   In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.

3. United States Constitution, 14th Amendment:

   Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Title 22, Oklahoma Statutes 1971, section 404:

The indictment or information must charge but one offense, but where the same acts may constitute different offenses, or the proof may be uncertain as to which of two or more offenses the accused may be guilty of, the different offenses may be set forth in separate counts in the same indictment or information and the accused may be convicted of either offense, and the court or jury trying the cause may find all or either of the persons guilty of either of the offenses charged, and the same offense may be set forth in different forms or degrees under different counts; and where the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count.

5. Title 63, Oklahoma Statutes 1971, section 2-401 (B) (2)

Any person who violates this section with respect to:

...

(2) Any other controlled dangerous substance classified in Schedule I, II, III, or IV is guilty of a felony and shall be sentenced to a term of imprisonment for not less than two (2) years nor more than ten (10) years and a fine of not more than Five Thousand Dollars

($5,000.00). Such sentence shall not be subject to statutory provisions for suspended sentences, deferred sentences or probation.

STATEMENT OF THE CASES

BACKGROUND

In each of the two cases, of which review by this Court is sought, the petitioner was charged and convicted by jury for the offense of unlawful delivery of marihuana to an undercover agent, Jack Wilkerson. In each of the cases, the punishment was fixed at ten (10) years imprisonment with the additional penalty of the maximum statutory fine of Five Thousand Dollars ($5,000.00) assessed in one of the cases. And, in each of the two cases, the Court of Criminal Appeals of the State of Oklahoma affirmed the convictions and the penalty.

To understand these two cases, they must be placed in their proper perspective. Each case grew out of a law enforcement scheme put together by one Edward Loffi, an agent of the Oklahoma State Bureau of Investigation. Loffi testified that: "we were in the vicinity, sir, to try to--make any narcotics case." In order to make his narcotics case, Loffi recruited two undercover agents--one being Jack Wilkerson who is referred to above.

During his campaign to make his narcotics case, the petitioner was arrested and charged four separate times. All of the arrests were made in Durant, Oklahoma for the alleged offense of delivering small quantities of marihuana to one of Loffi's undercover agents. According to the records, contact was made between the defendants and undercover agents at the following named spots and delivery of narcotics claimed on the following indicated days:

*CRF-72-122, Toot & Scoot, 9/30/72;
*CRF-72-127, Pappys Play Pen, 10/1/72;
*CRF-72-128, 109 Bar, 10/7/72, and
*CRF-72-133, Falcon Club, 10/11/72.

*These numbers are the trial court case numbers.

A brief review of the facts in each of these cases will clearly show their similarity and will unveil the almost sadistical law enforcement scheme of Edward Loffi and the State prosecuting attorney who was working closely with Loffi.

CRF-72-122: Wilkerson, the undercover agent met the defendant, Disheroon, at Toot and Scoot. A "white female" accompanied Wilkerson to the spot. She went inside, and then came back out of Toot and Scoot and got back into Wilkerson's car. Two white males then came out and got in a car and drove to a residence. Wilkerson and the "white female" followed. At the residence, Wilkerson and the "white female" get out of the car and approached the residence at 732 South Ninth. After some discussion, Wilkerson alleges that Disheroon handed a plastic bag containing green leafy substance to the female, and the female handed to Wilkerson. Disheroon was then allegedly handed a twenty dollar bill. Then at a prearranged destination this leafy substance was given to Mr. Loffi.

CRF-72-127: Wilkerson and Thurman, another undercover agent, were in Pappy's Play Pen and were approached by James Davis, one of the defendants, who wanted to know if anyone wanted to buy some marihuana. Wilkerson said that he did. They then left in Wilkerson's car to go to another club where Disheroon was. Davis got out of the car and went into the "Our Club". Shortly thereafter, Davis and Disheroon came out of the club and went over to Disheroon's car which

was allegedly about 30 feet from Wilkerson.

Wilkerson testified that he saw Disheroon take two plastic bags out of the car and give them to Davis. The bags were handed to Wilkerson by Davis who was given $20.00 by Wilkerson. This money was then given to Disheroon by Davis according to the testimony of Wilkerson. The plastic bags were then turned over to Loffi at a prearranged place.

CRF-72-128: Thurman and Wilkerson met Davis at 109 Bar as previously agreed; they had earlier discussed buying some THC that Disheroon was allegedly holding. The three men got into Wilkerson's car and drove to Disheroon's residence at 721 South Main. Davis got out of the car and talked with Disheroon who allegedly removed a plastic bag from the side of the house. From this bag, Disheroon removed some white objects and handed them to Davis. Davis handed them to Thurman who turned them over to Loffi at a prearranged place.

In each of the above cases, Disheroon was convicted by the jury and give the maximum prison sentence of ten (10) years to run consecutively and not concurrently. Disheroon was also charged in the fourth case (CRF-72-133); however, he was never brought to trial on the charge. The State was content with its accumulation of thirty (30) years of prison time gained in the first three convictions. A review of the preliminary testimony in CRF-72-133 shows the facts to be almost identical to the facts in the other cases.

With each of the cases, the undercover agent made contact with Disheroon; an alleged delivery of marihuana was made on September 30, October 1, October 7, and October 11; each alleged delivery involved only a small quantity of the substance; and in each case the substance

was turned over by the undercover agent to Loffi. Missing in each of the cases is any effort by Loffi to find the source of the marihuana.

From the facts of the cases, the supply of marihuana was apparently at the residence of Disheroon, 721 South Main. Nevertheless, no attempt was made by Loffi or the State prosecuting attorney to obtain a search warrant to inspect the residence and take control of all the marihuana in the possession of Disheroon. Instead of making an early arrest and confiscating the entire supply and thereby building a strong evidentiary case, Loffi elected to make four separate buys during the period of September 30 and October 11, 1972. The State prosecuting attorney then elected to file four separate charges; hold four separate preliminary hearings; and subject Disheroon to an accumulated penalty of forty (40) years in prison and $20,000.00 in fines.

Disheroon was tried and convicted on three of the charges; each conviction was affirmed by the Court of Criminal Appeals of the State of Oklahoma; and he is presently serving a term of thirty (30) years in prison. This term of thirty years is based on three ten year sentences that must run consecutively. Furthermore, under Oklahoma law, the terms cannot be suspended and the defendant cannot be placed on probation. T. 63 Okla. Stat. 1971 sec. 2-401 (b) (2).

Only two of the three cases are now being presented to this Court for review. The reason is that the conviction of Disheroon in CRF-72-128 was affirmed by the Court of Criminal Appeals on September 17, 1973. *Disheroon* v. *State of Oklahoma*, 44 Okla. B. Jo. 3021 (Okl. Cr. 1973), 514 P.2d 685 (Okl. Cr. 1973) (Appendix C). The ninety day rule precludes review of that case. Review is sought for cases CRF-72-122 (Court of Criminal

Appeals No. F 73-316); and CRF-72-127 (Court of Criminal Appeals No. F-73-305).

Disheroon v. *State of Oklahoma*

No. F-73-305

1. The Facts:

Disheroon was convicted for the offense of Unlawful Delivery of Marihuana and was sentenced to serve ten (10) years in prison. The basic facts, set out above, show that Disheroon handed two small plastic bags to Wilkerson, the undercover agent, who at a prearranged place delivered the substance to Edward Loffi, the agent of the Oklahoma State Bureau of Investigation. On the 31st day of October, 1972, the cause came on for preliminary hearing and based on the testimony of Wilkerson, the defendant was bound over for trial.

2. The Trial Court:

Wilkerson, the undercover agent for Loffi, was not present at the trial and was therefore not subjected to cross-examination. Over the objections of the defendant, the trial court permitted the State to read into evidence the preliminary testimony of Wilkerson. The only evidence of the unavailability of this key witness was a narrative statement of the prosecuting attorney who had previously worked closely with Wilkerson in his capacity as undercover agent. There would have been absolutely no evidence of guilt without the testimony of Wilkerson.

Based solely on the preliminary testimony of Wilkerson, the defendant was convicted and received the maximum sentence of ten (10) years in prison. A motion for new trial was denied on the 27th day of March, 1973; and Disheroon appealed, filing his petition in error on the 25th day of September, 1973.

3. The Appeal:

On January 23, 1974, the Court of Criminal Appeals of the State of Oklahoma affirmed the conviction and sentence of Disheroon in a 2/1 opinion. Judge Brett dissented on the ground that the decision was inconsistent with *Barber* v. *Page*, 390 U.S. 719 (1967). The court held that the preliminary testimony of Wilkerson was admissible. It also held that there was no error in charging, trying and convicting Disheroon on three separate times.

Disheroon v. *State of Oklahoma*

No. F-73-316

1. The Facts:

Disheroon was convicted for the offense of Unlawful Delivery of Marihuana; he was sentenced to serve ten (10) years in prison and fined Five Thousand Dollars ($5,000.00). The basic facts, set out in background statement, show that Disheroon delivered to Wilkerson a small package of marihuana on the 30th day of September, 1972. Wilkerson then delivered the substance to Edward Loffi at a prearranged place. This cause came on for preliminary hearing on the 31st day of October, 1972. Based on the testimony of Wilkerson, the undercover agent, Disheroon was bound over for trial.

2. The Trial Court:

Wilkerson, the undercover agent for Loffi, was not present at the trial and was therefore not subject to cross-examination. Over the objections of the defendant, however, the trial court permitted the State to read into testimony the preliminary testimony of Wilkerson. This testimony was absolutely indispensable to the conviction and defense of Disheroon. The only evidence of the un-

availability of Wilkerson was the narrative type statement of the prosecuting attorney who had previously worked closely with the undercover agent, Wilkerson.

Based solely upon the preliminary testimony of Wilkerson, the defendant was convicted and sentenced to serve ten (10) years in prison and pay a fine of Five Thousand Dollars ($5,000.00). Defendant's motion for new trial was denied on the 15th day of June, 1973. A petition in error was filed on the 26th day of September, 1973.

3. The Appeal:

On the 20th day of February, 1974, the Court of Criminal Appeals of the State of Oklahoma affirmed the conviction, prison sentence and fine. Judge Brett dissented on the same reasons stated in his dissent in the previous *Disheroon* case (F-73-305).

REASONS FOR GRANTING THE WRIT

1. Admission of the preliminary testimony of Wilkerson, the undercover agent, in the trial was a denial of petitioner's constitutional right of confrontation; and the admisstion is inconsistent and contrary to the established precedent of the Court.

"In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him" (6th Amendment, U.S. Const.). The Constitution of the State of Oklahoma guarantees to the accused the same protection.

> He (the accused) shall be informed of the nature and cause of the accusation against him and have a copy thereof, and be confronted with the witnesses against him....Art. 2 Okla. Const. sec. 20.

Based on the constitutional principles and the judicial authority to be herein discussed, the defendant, Disheroon, has been denied his right to confront in open court his accuser. The facts of this case offer a classical example of why the framers of the Constitution considered confrontation as one of our fundamental rights.

The importance of the right of confrontation was significantly elevated when the Supreme Court in *Berger* v. *California*, 393 U.S. 314, 315 (1968) ruled that its pronouncements in *Barber* v. *Page*, 390 U.S. 719 (1968) must be "*given fully retroactive application.*" (emphasis added) In the *Barber* case, the Supreme Court reaffirmed its belief that the "right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal". *Barber* v. *page*, 390 U.S. 719, 721 (1968). This principle of justice was recognized and followed by Oklahoma's Court of Criminal Appeals. *In re Bishop* 443 P.2d 768 (Okl. Cr. 1968); *Tucker* v. *State*, 481 P.2d 167 (Okl. Cr. 1971); and *Holmes* v. *State*, 501 P.2d 830 (Okl. Cr. 1972).

With the present *Disheroon* cases, however, it appears that the Oklahoma court is returning to the pre-*Barber* v. *Page* use of prelininary testimony. The Oklahoma court has ignored the decisions of the Supreme Court as well as its own post-*Barber* v. *Page* decisions on the issue of confrontation.

Justice Jackson perhaps put the right of confrontation in the clearest context when he said in a dissenting opinion, in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 225 (1953), that:

> Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the

> best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* considerations.

And as Justice Frankfurter once noted: "The history of American freedom is, in no small measure, the history of procedure." *Malinski* v. *New York*, 324 U.S. 401, 414 (1945) (concurring opinion). See also: McKay, The Right of Confrontation, 1959 Wash. U.L.Q. 122; Semerjian, The Right of Confrontation, 55 ABAJ 152 (1969).

Where a witness has given prior testimony at previous judicial proceedings against the same defendant, an exception has been made to the confrontation requirement where the witness is unavailable. The main thrust generally involves the question of availability of the witness. This issue will be covered; however, it should here be stated that this is not the general missing witness case. Consequently, the State should not even be allowed to prevail itself of the exception.

Even if Jack Wilkerson were unavailable, beyond the jurisdiction of the court, and refused to come to testify, his preliminary testimony should have been rejected at the trial in this case. In most cases involving the use of preliminary testimony, the missing witness was just that--a witness, nothing more and nothing less.

A brief review of the cases involving missing witnesses in which the court allowed preliminary testimony to be introduced will make the point. In *Eastham* v. *Johnson*, 338 F. Supp. 1278 (E.D. Mich. 1972), the missing witness who had testified at preliminary examination was a co-conspirator of the defendant. The missing witness in the trial of *United States* v. *Mobley*, 421 F.2d 345 (5th Cir. 1970) was also a co-defendant who had entered a plea of guilty. This co-defendant had testified at the

first trial of the petitioner, but after that case was reversed the co-defendant refused to testify at the second trial. *Phillips* v. *Pitchess*, 451 F.2d 913 (9th Cir. 1971) also involved testimony taken at the first trial which was read into the record at the second trial. The missing Witness had been a patient of the petitioner doctor who had been convicted of second degree murder in connection with medical malpractice in operation of another patient. For other cases showing the nature of the missing witness, see: *Lyon* v. *United States*, 413 F.2d 186 (5th Cir. 1969); *United States* v. *Allen*, 409 F.2d 611 (10th Cir. 1969); *Mason* v. *Hill*, 408 F.2d 903 (10th Cir. 1969).

In all of these cases, the missing witness was just a witness. In this present case, Jack Wilkerson was an undercover agent and informer recruited by Edward Loffi of the Oklahoma State Bureau of Investigation. Wilkerson and Cary Thurman were recruited by Loffi especially to buy narcotics. Loffi paid the expenses of the agents and furnished money with which to buy drugs.

It should be made very clear, at this point, that the defendant is not challenging the right of law enforcement agencies to use undercover agents. When paid witnesses are used by the State, however, the State has a definite obligation to produce that person as a witness. The State must not be allowed to come to the trial and say that the paid informer is not available and thereby deprive the accused of his right of confrontation and cross-examination.

As the Supreme Court observed in *Barber* v. *Page*, *supra*, "a preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial..." "*The right to confrontation is basically a trial right.*" Robert McKay, Dean of the New York University

Law School and one of the most highly respected constitutional scholars, makes the point that where testimony of an informant is indispensable to make a case for the State, "the demands of fairness would even more clearly require that the informant's tale be properly tested in the only possible way, through cross-examination." McKay, The Right of Confrontation, 1959 Wash. U.L.Q. 151-152.

If the State wishes to conceal the identity of paid informers, it must make its case without the testimony of that informer. Conversely if undercover agents are permitted to testify, the accused is entitled to receive reports made by agents to the F.B.I. *Jencks* v. *United States*, 353 U.S. 657 (1957). Witnesses in that case had gone to the F.B.I. and offered their services as undercover agents. *Id* at 665. Under these circumstances, the Supreme Court ruled that the accused was entitled to the statements, and that the accused was "not required to lay a preliminary foundation of inconsistency." *Id* at 666. The events and activities of the undercover agent was enough. As the court stated in *Velarde-Villarreal* v. *United States*, 354 F.2d 9 (9th Cir. 1965), if the paid informer "*is available for hire, he should be available to come and testify.*" *Id* at 13. (emphasis added)

It was suggested in the *Velarde* case that the paid informer might have been sent out of the country and into Mexico by the customs agent. *Id* at 12-13. If the agent did participate in a plan for the witness to disappear so as to be unavailable to the defense, "this action might constitute an obstruction of the defense...." *Id* at 13. Regarding the use of paid informers, the court stated:

> The practice of the Government in employing agent-informers in narcotics cases is well

> known. We also know that such agents are usually not trained officers--often they are themselves addicts or former addicts. The Govment must know that an eager informer is exposed to temptations to produce as many accuseds as possible at the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well. One could hardly expect such informants always to stay on the proper side of the line which separates those two cases. And since the Government chooses to utilize such agents, with the attendant risk of entrapment, it is fair to require the Government which uses this inherently dangerous procedure to take appropriate precautions to insure that no innocent man should be punished. *Id* at 13.

For a more recent case that follows *Velarde*, see: *U.S.* v. *Pollard*, 479 F.2d 310 (8th Cir. 1973).

Wilkerson was an undercover agent and informer which makes confrontation indispensible for any chance of a fair and impartial trial. It is understandable that Mr. Loffi would prefer to keep his identity concealed, however, his desire would not comport to our Constitution. When he elected to use an undercover agent, the State was obligated to insure his presence in the court room. This missing witness, Wilkerson, is in the business of convicting. His presence is indispensible.

Paid informers and undercover agents will always be unavailable for the trial if the State is allowed to do what was done in this case. By their very nature of being surrounded by secrecy undercover agents will as far as possible make themselves unavailable. They would prefer the more relaxed and perhaps less public preliminary hearing. At the preliminary they may be subject to less rigorous cross-examination.

Even if the State was allowed to use the preliminary testimony of an undercover agent and informer when that witness was unavailable, the State in the present case failed to show that Wilkerson was unavailable.

The Supreme Court, in *Barber* v. *Page*, *supra* recognized and preserved the exception to the confrontation rule. Made clearer in *Barber* v. *Page*, was that the State had the burden to show that the witness was unavailable. The Supreme Court rejected the notion that the mere absence of a witness from the jurisdiction is sufficient ground for dispensing with constitutional confrontation.

Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government have largely depreived it of any continuing validity in the criminal law. *Barber* v. *Page*, 390 U.S. 719, 723 (1968).

What this Court was saying in the *Barber* case is not factually analogous to the facts in the present case. Based upon the total lack of evidence on the issue in the present case, we don't know why Jack Wilkerson, the key witness, was not available. What can be gained from the facts in *Barber* is an understanding of the duty imposed on the State. There is a positive duty to make a diligent effort to find the witness, and an equally positive duty to secure his attendance at the trial.

After reviewing the *Barber* decision, the Oklahoma Court observed in *In re Bishop*, 443 P.2d 768 (Okl. Cr.1968) that: "We are of the opinion...that the Honorable United States Supreme Court decision does not preclude the use of such preliminary hearing testimony, *in proper circumstances.*" *Id* at 772. (emphasis added) Ex-

plaining the proper circumstances, the Oklahoma Court stated:

> The transcript of testimony recorded at the preliminary hearing may be read at the accused's trial when those circumstances exist. But in that instance, the State is required to show that a diligent effort has been made to locate the missing witness, *and that he is actually unavailable. id* at 772 (emphasis belongs to the court).

Further elaboration on the requirements of the State was made by the Oklahoma Court, as it cited *Newton* v. *State*, 403 P.2d 913 (Okl. Cr. 1965). It was noted that "the admission of previous testimony of a missing witness is at the discretion of the trial judge...subject to certain limitations.

> These limitations include: that the testimony was taken down by a reporter in the presence of the defendant and his counsel, who cross examined him; that the testimony was filed with the clerk; that a proper predicate is laid for the introduction of such testimony, by showing the exercise of due diligence in attempting to locate the missing witness; and that due diligence has been exercised in an effort to produce the witness, by timely issuance and service of subpoena. *In re Bishop, supra*, at 773.

It was then stated that if the State has not satisfied these limitations the "transcript of previous testimony should be denied by the trial court." *Id.* That if the State is unable to satisfy the limitations, the accused must be discharged from said judgment and sentence. Since *In re Bishop, supra* the Oklahoma Court handed down two other decisions on the point of using transcript of previous testimony. In *Tucker* v. *State*, 481 P.2d 167 (Okl. Cr. 1971), the admission of the transcript was affirmed; however, the court carefully pointed out the diligent

effort made by the State. Quoting the trial judge, the court stated: "I just don't know what more you could require of them". *Id* at 169. The effort made by the State was established by evidence and not a mere pronouncement that the witness was unavailable. As the court noted with approval:

> Three officers testified concerning efforts made to locate and serve a subpoena on the witness. The trial court made a judicial finding that the state had been diligent in attempting to locate the missing witness...*Id* at 169.

More recently, the Oklahoma Court, in *Holmes* v. *State*, 501 P.2d 830 (Okl. Cr. 1972), held that the trial court erred in permitting the reading of the transcript of testimony into the record. If there is a difference between *Holmes* and *Tucker* v. *State*, it would be the identity of the witness. In *Tucker* the missing witness's testimony was offered as rebuttal; but in *Holmes*, the missing witness, as described by this court, "*was vital to the state's case*". *Holmes* v. *State*, *supra*, at 833.

The facts in the *Holmes* case that caused the court to reject the transcript testimony are almost identical to the facts in the present case. In the *Holmes* case, the record of the trial court reflected that two subpoenas had been issued for the witness. Each was returned "Not Found". At the trial the Assistant District Attorney stated that he was prepared to offer testimony; however, no testimony was offered. *Holmes* v. *State*, *supra* at 833. To this showing, the court stated that the state had failed to show the exercise of due diligence in locating and producing the missing witness. *Id* at 833.

Two clear requirements emerge from the *Holmes* decision:

> 1. The showing of due diligence to prove unavailability of a witness required more from the state than the mere issuance of a subpoena and the return of "Not Found". *Id* at 833.
>
> 2. Testimony should have been offered as to what efforts, if any, were made to serve the subpoena and the ultimate fact that the witness was unavailable to testify. *Id* at 833.

What was said about the requirements to show due diligence is consistent with the holdings in other jurisdictions. For example, in *Eastham* v. *Johnson*, 338 F. Supp. 1278, 1281 (E. D. Mich. 1972), the court stated that:

> The determination of "good faith effort" by the prosecution is a factual question to be determined in light of the *circumstances in each case.* (emphasis added)

In the present case, the state offered no substantial evidence that a "good faith effort" had been made to find and produce Wilkerson for trial. The full extent of the state's showing of due diligence to prove the unavailability of Wilkerson was a narrative statement made by the prosecuting attorney. This was the very sort of thing rejected by the Oklahoma Court in *Holmes* v. *State*, 501 P.2d 830 (Okl. Cr. 1972).

The prosecuting attorney who had earlier signed a commission card for the undercover agent to operate, made his narrative statement to the court as the only predicate to the introduction of the transcript. This prosecuting attorney explained to the court that "we have made diligent effort to obtain Mr. Wilkerson's personal presence here." To show this diligent effort, he explained that Wilkerson was subpoenaed on two separate dates and telephone calls were made. But then the

prosecutor noted that Wilkerson had been in Durant the Monday and Thursday before this trial and that he had promised to be present as a witness at the trial. Yet the prosecutor did nothing to deliver the subpoena that had been previously issued.

Over the strong objection of defense counsel against accepting a narrative statement from the prosecuting attorney on the availability of a witness, the trial court accepted the narrative statement as proof. If a narrative statement of a prosecuting attorney can be accepted as proof, we can soon dispense with a trial at all and accept an opening statement as proof of one's guilt. With this narrative statement and the subpoena returned "Not Found", the trial court permitted the state to read the transcript of Wilkerson's testimony taken at the preliminary trial.

The only thing accomplished by his narrative was to tell the trial court what he was prepared to prove: however, he offered no testimony. This was explicitly held in *Holmes* v. *State*, *supra* at 833 to be an inadequate exercise of due diligence in locating and producing the missing witness. Not one single witness was called by the State to prove that any effort was made to locate Wilkerson.

In *Tucker* v. *State*, *supra*, a case in which the Oklahoma Court did find due diligence, the state had presented testimony from three officers concerning their efforts to locate and produce a witness. Available to the state in this case was Mr. Loffi, the agent of the Oklahoma State Bureau of Investigation in charge of the Durant narcotics mission. He was not called to the stand to testify even though Wilkerson had earlier stated that he had worked as an undercover agent with Mr. Loffi for three years.

It just does not seem consistent with American jurisprudence for the secret arm of the police to come in with its paid informers and undercover agents to set up and capture their prey and then steal away to avoid the exposure of a trial. Law enforcement is important, but not so important that the state cannot insure the presence of key witnesses. In this case, the state did nothing to insure the presence of Jack Wilkerson as a witness subject to the cross-examination of defense at the trial. *Velarde-Villarreal* v. *United States*, 354 F.2d 9 (9th Cir. 1965); *United States* v. *Pollard*, 479 F.2d 310 (8th Cir. 1973).

As previously mentioned, Jack Wilkerson was not the ordinary witness. He was an undercover law enforcement officer of the State of Oklahoma and he was working under the control and the direction of the District Attorney. Further, the state had numerous opportunities to put Wilkerson under some kind of court order; however, no effort was made to do this.

The Court of Criminal Appeals for the State of Oklahoma has now returned to a position antagonistic to the constitutional right of confrontation. This court should therefore grant this writ in order to prevent departures from the principles expressed in *Barber* v. *Page*, *supra*.

2. Prosecution of these cases as separate actions twice put the petitioner in jeopardy of life or limb for the same offense.

It is stated in the Fifth Amendment to the Constitution of the United States that: "No person...shall...be subject for the same offense to be twice put in jeopardy of life or limb." Technically, the offenses for which Disheroon was charged could be considered as separate offenses. Nevertheless, factually and substantively, the

defendant was charged, tried and convicted three separate times for a single offense.

Judge Brett, who dissented in the present two cases, also dissented in *Kite* v. *State*, 506 P.2d 946 (Okl. Cr. 1973) involving separate prosecutions for separate deliveries of narcotics. He stated that:

> The law does not permit two prosecutions and double punishment for a single criminal offense. ...'A series of criminal charges cannot, under our system of jurisprudence, be based upon the same criminal act or transaction; a single criminal act cannot be split up or subdivided into two or more distinct offenses and prosecuted as such: *Id* at 951.

In *In re Johnson*, 65 Cal. 2d 393, 54 Cal. Rptr. 873, 420 P.2d 393 (1966), a case cited by Judge Brett, the California Court held that even though there were separate deliveries of narcotics, there was still but a single transaction, allowing only one conviction. That court correctly told us that the number of deliveries is not conclusive proof that there were a number of crimes committed. "*The entire transaction must be considered.*"

Mr. Loffi, agent of the Oklahoma Bureau of Investigation, had complete and continuing control over the alleged deliveries of marihuana made by Disheroon and the activity of his undercover agents. After the initial contact and delivery of marihuana, the times could have been repeated until the defendant had made 100 deliveries. This would have allowed the state to obtain 1,000 years (100 convictions at 10 years each) prison time for the defendant.

Loffi chose to stop with four deliveries of which three of the cases were prosecuted giving the defendant thirty (30) years in prison and $5,000.00 in fines. Loffi's

undercover agents allegedly took a delivery of marihuana from Disheroon on September 30, 1972, October 1, 1972, October 7, 1972 and October 11, 1972. During this relatively short span of time, Loffi's agents made four hits; but this process could have continued. The arrest came only after Loffi and the prosecuting attorney had decided to halt the operation.

The deliveries were separate only because Loffi elected to obtain small quantities of the substance with each delivery. Once the first delivery was completed, Loffi had complete control over the timing of the arrests and charges filed. Loffi was on a designed mission and until the mission was completed, there was but one single continuing transaction. The prosecuting attorney was aware of the presence and activity of Loffi and his undercover agents.

In *Heldenbrand* v. *Mills*, 476 P.2d 375, 378 (Okl. Cr. 1970), Judge Brett, in a concurring opinion, noted the importance of observing "that the prosecutor was fully aware of the possibility of two offenses existing when the first charge was filed." Before the first case was filed in this present case, the prosecutor knew of all the pending charges. In fact, the prosecutor had worked with Loffi and had signed a special commission card for Wilkerson, the missing witness.

Arising out of Mr. Loffi's mission in Durant, were four preliminaries and three trials involving these defendants. This is the sort of prosecutor indiscretion that has made our courts hopelessly clogged. This is the type of abuse that has packed our jails to the rioting point. Simply because Mr. Loffi decided that these defendants should have long prison terms, he spaced his alleged four purchases over a 13 day period. The prosecutor followed

by filing separate informations and holding separate trials. *The result*; the defendants got 30 years of jail time for something that the Legislature established a maximum sentence of 10 years.

Surely this Court cannot say that the State of Oklahoma has followed the due process standard of fundamental fairness. Instead the conduct of the law enforcement officers in this case is "shocking to the universal sense of justice." *Kinsella* v. *U.S.*, 361 U.S. 234 (1960); *Ashe* v. *Swenson*, 397 U.S. 436 (1970). A look at the sentencing process will show the tragedy reaped upon the people of Oklahoma by this case.

Our citizens are entitled to great protection from law violators. Nevertheless, there can be no glory upon American jurisprudence when young men charged with a crime are thrown into a hell hole like McAlester under the circumstances of this case. Terms of imprisonment must be served consecutively in the order of imposition. *Thurman* v. *Anderson*, 500 P.2d 1074 (Okl. Cr. 1922). The inmate must serve his first sentence imposed before serving subsequently imposed sentences. *Ward* v. *Anderson*, 498 P.2d 425 (Okl. Cr. 1972); *Beck* v. *State*, 478 P.2d 1011 (Okl. Cr. 1970).

This means that by the individual decision of Loffi to allow the purchases to continue, the prosecuting attorney could avoid concurrent sentencing. It was but for the decision of Loffi and the prosecuting attorney that Disheroon received only thirty (30) years in prison. The undercover agent, Wilkerson, could have moved into the backyard of Disheroon until he had made enough deliveries to account for 100 years or 1,000 years.

That is a lot of power in the hands of this agent (Loffi) of the Oklahoma State Bureau of Investigation. It

is this power that might have caused the court in *Velarde-Villarreal* v. *U.S.*, 354 F.2d 9 (9th Cir. 1965), to insist that appropriate precautions be used when the Government uses the inherently dangerous procedure of undercover agents.

Whether or not the circumstances of the present cases present a classical example of double jeopardy, it is clear that separate trials and convictions were a denial of fundamental fairness and thereby a deprivation of due process.

3. The prosecution of these cases as separate actions violated every standard of fairness and justice depriving the defendant of his fundamental right to due process.

(a) Entrapment:

In the recent case, *U.S.* v. *Russell*, ____U.S.____, 93 S. Ct. 1637 (1973), involving the defense of entrapment, the United States Supreme Court in a narrow 5/4 decision rejected the claim raised by the defendant. Still the majority indicated that:

> We may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processses to obtain a conviction. *Id* at 1643.

The key to determining if there has been a denial of due process will be whether the conduct of law enforcement officers violated that "fundamental fairness, shocking to the universal sense of justice." *Id* at 1643, citing *Kinsella* v. *U.S.*, 361 U.S. 234 (1960).

Conduct of the law enforcement officers involved in the present case has brought us to that day mentioned by the Court. This conduct was "so outrageous that due

process principles (should) bar the government from invoking judicial processes to obtain a conviction." *Id* at 1643. This may not be too apparent when a single transcript of this case is examined alone. The shocking nature of the conduct, however, becomes very clear when this present case is considered together with its companion cases.

The United States Supreme Court has ruled that it is not entrapment if officers of the Government merely afford opportunities or facilities for the commission of the offense. *Sorrells* v. *U.S.*, 287 U.S. 435 441 (1932). In the *Sorrells* case, the defense of entrapment was, however, upheld when the Government used an undercover agent who encouraged and persisted the accused to go out and buy him some liquor.

In another case, more analogous to the present, the Supreme Court found as a matter of law that there was entrapment. *Sherman* v. *United States*, 356 U.S. 369 (1958). The defendant in that case had been enticed by an undercover agent to sell him narcotics. the Government informer had met the defendant in a doctor's office where both were being treated to be cured of narcotics addiction. *Id* at 371. On several occasions, the agent tried to get the defendant to supply him with a source; and the defendant was finally persuaded. *Id* at 371.

Several times thereafter, the defendant obtained a supply of narcotics and shared them with the agent-informer. After several such sales, agents of the Bureau of Narcotics were informed. A surveillance was then set up and Government agents observed defendant giving narcotics to the informer in return for money supplied by the Government. *Id* at 371. No evidence was put on by the defense; however, from the state's testimony, the

court held as a matter of law that there was entrapment. *Id* at 373. Further, the court stated that:

> It makes no difference that the sales for which petitioner was convicted occurred after a *series of sales*. They were not independent acts subsequent to the inducement but *part of a course of conduct* which was the product of the inducement. *Id* at 374. (emphasis added).

The emphasized words of the court indicate the importance of the missing witness, Wilkerson. Only the missing witness and the defendant could really tell if there would have ever been a crime except for the inducement of the Government agent.

In a later decision, the Supreme Court rejected the defense of entrapment. *United States* v. *Russell*, ___ U.S. ___, 93 S. Ct. 1637 (1973). Conduct of the agent in that case was that he supplied one of the necessary ingredients to produce the particular narcotic. Finding entrapment as a matter of law, the lower court in the *Russell* case was found to be influenced by two theories:

> 1. Entrapment will be found, regardless of predisposition to commit crime, whenever the Government supplies contraband to the defendants. *Id* at 1641.
>
> 2. A conviction must be reversed, even if no entrapment, when Government investigator is so enmeshed in the criminal activity that the prosecution of the defendants would be repugnant to the American Criminal justice system. *Id* at 1641.

It was noted by the court that these theories were "premised on fundamental concepts of due process and evince the reluctance of the judiciary to countenance 'over-zealous law enforcement.' " *Id* at 1641. (citing *Sherman* v. *United States, 365 U.S. 369 [1958]* [*Frank-*

furter, J., concurring). The court refused to accept an expansion of the entrapment concept; however, it did not deny that due process would compel a reversal of a conviction when the conduct of law enforcement agents was so outrageous. Reviewing the facts in the *Russell* case, the court concluded that:

> The law enforcement conduct here stops far short of violating that "fundamental fairness", shocking to the "universal sense of justice", mandated by the Due Process Clause of the Fifth Amendment. *Id* at 1643.

As viewed by the Supreme Court, "entrapment is a limited defense." *Id* at 1644. It is rooted not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been "*over-zealous law enforcement*," but *instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense, who was induced to commit them by the Government. Id* at 1644 (emphasis added).

Based upon the *Russell* decision, "over-zealous law enforcement" is not an entrapment argument. Instead it is a general due process argument which of course has the same effect except for the total impact upon law enforcement. Interestingly, however, the court did say that entrapment would be measured on the "notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense." *Id* at 1644. This standard can be satisfied in this case as will be explained.

As to the general entrapment argument, this could never be developed in this case because the state's principal witness was conveniently absent for each of the

three trials. This was the same situation found in the *Velarde-Villarreal* case, *supra* at 354 F.2d 9, wherein the Ninth Circuit required the Government to procure the witness or dismiss the case.

The question raised by the Supreme Court in the *Russell* case, regarding entrapment as measured by the intent of Congress, is even more pertinent to this case. For the crime for which the defendants were charged, the Oklahoma State Legislature set the penalty. In the information filed in this case, the defendant was charged with a violation of unlawful delivery of marihuana, Title 63, O.S. 1971, sec. 2-401 (B) (2). This section provides a penalty of "not less than two (2) *nor more than ten* (10) *years* and a fine of not more than Five Thousand Dollars ($5,000.00)." It is further provided in this section that: "Such sentence shall not be subject to statutory provisions for suspended sentences, deferred sentences or probation."

The Oklahoma Legislature decided that a person found guilty of selling marihuana should be subjected to prison term of not less than two years *nor more than ten years*. Perhaps in the wisdom of the Legislature, a person found guilty could during this period of time be rehabilitated to the extent of making him a more useful citizen. A penalty beyond this would be contrary to the expressed legislative intent. As the Supreme Court stated in the *Russell* case, entrapment will be measured by the notion that "Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense, who was induced to commit them by the Government." 93 S. Ct. at 1644.

In the present case, Loffi and the prosecuting attorney got around the intent of the Legislature to limit

the penalty to two to ten years by the simple devise of waiting until they had made four separate buys. By this technique, Loffi and the prosecuting attorney elected to increase the penalty to thirty (30) years. They showed no interest in the possible rehabilitation of a young man. If there was no entrapment in the first incidence, something that can be decided only after Wilkerson is produced as a witness, there was entrapment even under the *Russell* case in regard to the subsequent alleged deliveries.

Neither Mr. Loffi nor the prosecuting attorney is our Legislature, free to set the penalty for the violation of crimes. They must not be permitted to act as such by abusing the process as the facts indicate in this case. Whether this is entrapment or not, the judgment must be reversed and dismissed on the basis of our due process principles.

The defendant in this case deserved the right to prove entrapment. Such proof necessitated the presence of Wilkerson, the undercover agent. Until this witness had been interrogated and subjected to cross-examination, the jury and court will be unable to properly assess the entrapment claim.

For all of the above stated reasons, this court is urged to reverse the judgment and order the case dismissed. At the same time, this court should admonish the law enforcement officers for their questionable conduct.

(b) Mandate of Oklahoma Legislature:

The penalty established by the Oklahoma Legislature for an unlawful delivery of marihuana is a term of not less than two (2) years nor more than ten (10) years.

T.63 Okl.Stat.1971, sec. 2-401 (B) (2). By an administrative decision of Loffi and the prosecuting attorney, this statutory limitation on sentencing has been emasculated. Because these law enforcement officers elected to postpone any arrest of Disheroon until they had accomplished four deliveries, Loffi and the prosecuting attorney were able to increase the ten (10) year maximum sentence to a sentence in prison for thirty (30) years.

This standing alone is a blatant denial of due process. By what right does an agent of the Oklahoma Bureau of Investigation have to increase a prison sentence beyond the limits set by the Legislature? By what right does the state prosecuting attorney have to subject a person who falls into the scheme of Loffi to four separate preliminary hearings, three separate trials, and three convictions. When an administrative official can subvert the legislative will by the simple process of stacking separate offenses growing out of a continuing law enforcement scheme, we can expect the day when a misdemeanor is converted into a capital offense. This is so antagonistic to the principles of fairness and justice that it clearly violates our constitutional concept of due process.

The Oklahoma Legislature also provided that where the "same acts may constitute different offenses, ... the different offenses may be set forth in separate counts in the same indictment or information and the accused may be convicted of either offense." T. 22 Okl. Stat. 1971, sec 404. Judge Brett, dissenting in the present two cases, stated on this point that:

> I believe the separate charges should have been filed under the provisions of 22 O.S., 1973,

> §404, as separate counts in one information. I believe it is fundamentally unfair for the law enforcement officers to make consecutive buys of controlled dangerous substances in order to file separate charges against any defendant. Under such procedures, the law enforcement officers are permitted to determine the extent of punishment a defendant is to receive, which is a judicial function. Consequently, as I see the proper administration of justice, these several incidents should be included as separate counts in one information for the benefit of the jury. The initial objective of law enforcement having been accomplished, the subsequent incidents merely go to corroborate the charge of distribution. Thereafter, either the jury or the court should set the extent of punishment premised upon the facts presented.

Disheroon v. *State of Oklahoma*, 45 Okl. B. Jo. 334, 337 (Okl. Cr. 1974), 518 P.2d 892, 896 (Okl. Cr. 1974), Appendix A, p.____.

Although the statute uses the permissive word "may" in directing the state to set forth different offenses in separate counts, the concept of due process compels this under the circumstances of this case.

CONCLUSION

For all of the above reasons, this writ should be granted and the two judgments of the Court of Criminal Appeals for the State of Oklahoma should be reversed.

Respectfully Submitted,

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Appendix

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

Filed January 23, 1974

RONNIE H. DISHEROON,
Appellant,

vs.

THE STATE OF OKLAHOMA
Appellee.

FOR PUBLICATION

OPINION

BUSSEY, J.:

Appellant, Ronnie H. Disheroon, hereinafter referred to as defendant, was charged, tried, and convicted in the District Court, Bryan County, Case No. CRF-72-127, for the office of Unlawful Delivery of Marijuana; his punishment was fixed at ten (10) years imprisonment, and from said judgment and sentence a timely appeal has been perfected to this Court.

At the trial, Jack E. McGahey testified that he was the District Attorney for the 19th District, and that since the preliminary hearing, one of the States witnesses (Jack Wilkerson) had disappeared and was unable to be found. The trial court held a hearing outside the

presence of the jury to determine if the State had used due diligence in an effort to produce Witness Jack Wilkerson, for trial. The court, after determining that the State had used due diligence in an effort to produce Jack Wilkerson, and determining that cross-examination of this witness was afforded the defendant at the preliminary hearing but was waived, admitted the testimony of Jack Wilkerson and allowed it to be read to the jury.

The testimony of Wilkerson, as read to the jury stated that on October 1, 1972, he was undercover agent for Mr. Ed Loffi of the Oklahoma Bureau of Investigation. At about 1:25 that monrning, he and an officer Thurman were in a night club known as "Pappy's Play Pen" when a Mr. Davis (co-defendant) asked Wilkerson if he wanted to buy some marijuana. After agreeing to, Davis said that he would have to accompany him to another club where the defendant was to obtain it. the two left in Wilkerson's car and went to a sencond club known as "Our Club." Davis went into the club, came back outside and went about 30 feet ahead of Wilkerson's car to the defendant's car. There he met the defendant who opened the car and appeared to reach somewhere into the front interior. The defendant pulled out two sandwich-type plastic bags and handed them to Davis who then went to Wilkerson's car and got in the front seat. After Wilkerson exchanged a twenty dollar bill for the two bags, Davis got out of the car and handed defendant the money. Wilkerson left to turn the bags over to Mr. Loffi, who took them to the Crime Bureau.

Edward Loffi testified that he was an agent for the Oklahoma State Bureau of Investigation and was working in Bryan County on the morning in question: From a distance he saw Wilkerson and some other man leave a

night club. He followed them to second club and, through field glasses, observed the events as described by Wilkerson. He was, however, unable to see into the car to observe the alleged exchange, and he was never close enough to be able to identify Davis or the defendant. He received two plastic baggies containing a green, leafy substance from Mr. Wilkerson, which he initialed and kept in his possession until he turned them into the evidence locker at the Oklahoma State Bureau of Investigation laboratory. He indentified States exhibit #4 as being the two baggies he received from Wilkerson and turned over to the State Crime Bureau.

Donald Wayne Clodfelter testified that he was a forensic chemist for the Oklahoma State Bureau of Investigation. He identified State's exhibit #4 as being the evidence which he removed from the laboratory's evidence locker. He further testified he examined the substance and determined it to be marijuana.

Defendant testified that the was a professional musician and was at "Our Club" on the night in question with his girlfriend when James Davis came in. The three of them later walked outside with two other men. Defendant then asked for information about a bass player for the band. they went to a car and Davis got the address for a certain bass player out of the glove compartment, and handed it to the defendant. Shortly thereafter, Davis went to some other man and the rest of them walked back into the club. Defendant denied giving any green, leafy substance to Wilkerson or Davis, though he did see both of them on the night in question.

Lucile Disheroon, defendant's mother, testified that Wilkerson came to her house, offered to help her son, but needed to borrow five hundred dollars. As sub-

stantiated by two separate checks in custody of the court, he borrowed this amount two different times. He told her he would come to testify in defendant's behalf.

The defendant's first and second propositions of error assert that the trial court erred in admitting into evidence the testimony of Jack Wilkerson taken at the prelininary hearing, as the State failed to prove the unavailability of this witness, and this constituted a denial of denfendant's right to confrontation.

The record reveals that Jack Wilkerson was unavailable for trial and the District Attorney offered evidence the transcript of this witness' testimony taken at the preliminary hearing; the defendant objected, and the trial court held a hearing for determining if the State had exercised due diligence to locate Jack Wilkerson. After this hearing, the trial court admitted the transcript and allowed it to be read to the jury. The record further reveals that defendant waived cross-examination of this witness at the preliminary hearing and, therefore, no cross-examination of this witness went before the jury.

In the case of *In re Bishop*, Okl. Cr., 443 P.2d 768, this Court held in Syllabi Three:

> "The accused's failure to cross-examine a witness at preliminary hearing may constitute a waiver of the right of confrontation at at subsequent trial, as being an intentional relinquishment or abandonment of a known right or privilege, if the prosecution properly shows that the witness is actually unavailable to testify at the subsequent trial, and that sufficient effort has been exercised to produce the witness to testify."

Further, the Court went on to state, at page 772 of the Official Opinion, the following:

> "We are of the opinion, however, that the Honorable United States Supreme Court decision does not preclude the use of such preliminary hearing testimony, in proper circumstances. The transcript of testimony recorded at the preliminary hearing may be read at the accused's trial when those circumstances exist. But in that instance, the State is required to show that a diligent effort has been made to locate the missing witness, *and that he is actually unavailable.* The Supreme Court said in reference to this question:
>
> '***There may be some justification for holding that the opportunity for cross-examination of testimony at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable***.' (Emphasis added.)"

In the instant case we find, from the record, as the trial court did, that the State did show due diligence was exercised in an effort to produce witness Jack Wilkerson for trial. Therefore, we find no error in the trial court's admitting the testimony of Jack Wilkerson taken at the preliminary hearing.

The defendant's third proposition asserts that the prosecution of this case as a separate action violates every standard of fairness and justice and is a denial of due process.

In the instant case we find, from the record, as the trial court did, that the State did show due diligence was exercised in an effort to produce witness Jack Wilkerson

for trial. Therefore, we find no error in the trial court's admitting the testimony of Jack Wilkerson taken at the preliminary hearing.

The defendant's third proposition asserts that the prosecution of this case as a separate action violates every standard of fairness and justice and is a denial of due process.

The defendant's argument, under this proposition, is that he was alleged to have delivered marijuana to two undercover agents on four different occasions (September 30, 1972; October 1, 1972; October 7, 1972; and October 11, 1972), all occurring in the City of Durant, Oklahoma; that this action constituted one continuing offense and would not support four separate and distinct offenses and, therefore, the act of trying him on more than one charge constitutes double jeopardy.

After carefully reviewing the record in the three cases1/ in which he was convicted, we are of the opinion that each sale was a separate and distinct offense and find this proposition to be without merit. See *Loane* v. *State*, Okl. Cr., 490 P.2d 759.

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The defendant was charged with and convicted in F-73-316 for the crime of Unlawful Delivery of Marijuana and was sentenced to serve ten (10) years and pay a fine of Five Thousand ($5,000.00) Dollars; PC-73-160, charged and convicted for Unlawful Delivery of a Controlled Dangerous Substance, Phencyclidine (PCP) -- ten (10) years imprisonment (the appeal was affirmed and mandate issued); F-73-305, charged and convicted for the offense of Unlawful Delivery of Marijuana -- ten (10) years imprisonment (instant case).

Defendant's fourth proposition asserts the trial court erred in overruling his Demurrer to the State's evidence. This Court has consistently held that where there is competent evidence in the record from which the jury could reasonably conclude the defendant was guilty as charged, the Court of Criminal Appeals will not interfere with the verdict, even though there is a sharp conflict in the evidence and different inferences may be drawn therefrom, since it is the exclusive province of the jury to weigh the evidence and determine the facts. See *Williams* v. *State*, Okl. Cr., 373 P.2d 91 (1962). We, therefore, find this proposition to be without merit.

The judgement and sentence is, accordingly AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT, BRYAN COUNTY, OKLAHOMA
HONORABLE ALAN B. McPHERON, JUDGE.

RONNIE DISHEROON was convicted for the offense of Unlawful Delivery of Marijuana; his punishment was fixed at ten (10) years imprisonment and he appeals. AFFIRMED.

THOMAS DEE FRASIER, TULSA, OKLAHOMA,
Attorney for Appellant,

LARRY DERRYBERRY, ATTORNEY GENERAL,
JAMES L. SWARTZ, ASST. ATTORNEY GENERAL
STAN CHATMAN, LEGAL INTERN,
Attorneys for Appellee.

OPINION BY BUSSEY, J.,
BLISS, P.J., Concurs
BRETT, J., Dissents.

BRETT, J.: Dissents.

I must respectfully dissent to this decision. The majority opinion properly quotes the third paragraph of the syllabus to *In re Bishop, supra,* but that the statement provides that failure to cross-examine at preliminary examination **MAY** constitute a waiver of the right of confrontation. Consequently, the determination of whether or not such failure to cross-examine, constitutes a waiver depends upon the particular facts of each case. In this appeal I feel that the facts do no constitute the waiver referred to in Bishop.

In the instant appeal, Jack Wilkerson was a hired law enforcement officer, who defense counsel had every right to expect would be present at trial. In addition, Jack Wilkerson was the principal witness against the defendant, and he was allegedly the person who made the purchase of marihuana from defendant. Therefore, I can clearly distinguish the situation in this appeal from one in which another witness becomes unavailable to testify, and wherein the preliminary transcript is allowed to be used, as being proper circumstances referred to in Bishop. Under the circumstances of the instant appeal, I cannot agree that the proper circumstances exist to meet the confrontation provisions of both the United States Constitution and the Oklahoma Constitution. It is a foregone conclusion that the examination of a witness at preliminary examination is not as searching as that engaged in at trial. Notwithstanding the fact that the District Attorney testified concerning such efforts as he exerted to find the missing witness, Jack Wilkerson, it is not such diligence alone which is intended to meet the confrontation requirements. The United States Supreme Court stated in *Barber* v. *Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L ed 2d 255 (1967):

> "To suggest that failure to cross-examine in such circumstances constitutes a waiver of the right of confrontation at a subsequent trial hardly comports with this court's definition of a waiver as 'an intentional relinquishment or abandonment of a known right or privilege.' " Johnson v. Zerbst, 304 US 458, 464, 58 S CT 1019 , 1023, 82 L ED 1461, S Ct 1245, 1246, 16 L ED 2d 314 (1966).

Admittedly, in Barber the state knew the whereabouts of the witness, and no showing of diligence was made by the prosecution. But of equal importance in the instant matter is the fact that the prosecution witness was allegedly a recognized law enforcement officer. The record reflects that the prosectuion witness was either "bought off" by defendant's mother, or that his creditbility was of such questionable nature that he found other reasons for borrowing a thousand dollars from defendant's mother for the purpose of leaving the country. Nonetheless, as the record now exists defendant was unable to test the prosecution witness' creditibility by proper cross-examination. Consequently, I conclude that the facts herein are not sufficient to constitute "proper circumstances" referred to in *In re Bishop*, supra. I concede that the District Attorney testified concerning the efforts he made to locate Jack Wilkerson, and that according to his testimony that effort, under the other circumstances, might constitute sufficient diligence to show the unavailability of the witness; but under these fact, I cannot concede that such diligence alone waives the confrontation requirements.

Further, I believe the separate charges should have been filed under the provisions of 22 O.S., 1973, §404, as separate counts in one information. I believe it is fundamentally unfair for the law enforcement officers to make consecutive buys of controlled dangerous substances in order to file separate charges against any defendant. Under such procedures, the law enforcement officers is to receive, which is a judicial function. Consequently, as I see the proper administration of justice, these several incidents should be included as separate counts in one information for the benefit of the jury. The initial objective of law enforcement having been accomplished, the subsequent incidents merely go to corroborate the charge of distribution. Thereafer, either the jury or the court should set the extent of punishment premised upon the facts presented.

Therefore, having concurred in the first appeal lodged by defendant for the illegal distribution of controlled dangerous substances, which occured immediately prior to this incident, I feel compelled to dissent to this decision.

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

Filed February 20, 1974

RONNIE HAROLD DISHEROON,
Appellant,

vs.

THE STATE OF OKLAHOMA,
Appellee.

FOR PUBLICATION

OPINION

BUSSEY, Judge:

Appellant, Ronnie Harold Disheroon hereinafter referred to as defendant, was charged, tried and convicted in the District Court, Bryan County, Case No. CRF-72-122, for the offense of Unlawful Delivery of Marijuana, his punishment was fixed at ten (10) years inprisonment and a fine of five thousand dollars ($5,000) and from said judgment and sentence, a timely appeal has been perfected to this Court.

At the trial the testimony of Jack Wilkerson, as it was given at the preliminary hearing, was read to the jury over the objection of the defendant. Wilkerson testified that on September 30, 1972, he was working as an undercover agent with Edward Loffi, an agent with

the Oklahoma State Bureau of Investigation; that at approximately 4:45 p.m. he and a female companion went to the Toot and Scoot Drive-In. She went into the drive-in and returned to the car in approximately five minutes. Defendant and James Davis came out of the drive-in and got into a brown Chevrolet. They followed defendant and Davis to a location on South 9th Street. Upon arriving, he observed Davis hand something to some other people at which time he stated, "I'd like to have something like that if he has some more." Defendant went into the house and came out with a plastic bag containing a green leafy substance. He handed the bag to Wilkerson's female companion and Wilkerson gave him a $20 bill. He proceeded to a prearranged location and met Agent Loffi. He initialed the bag and gave it to Loffi.

Edward Loffi testified that he was an agent with the Oklahoma State Bureau of Investigation and on the afternoon in question was surveilling his undercover agent, Jack Wilkerson. He observed Wilkerson and a female companion drive to the Toot and Scoot Drive-In. The female entered the drive-in and exited a few minutes later. Two male subjects came out of the drive-in, got in the car and left the drive-in with Wilkerson following them. He followed Wilkerson to a residence on South 9th Street. He parked about a half a block away and observed a male subject hand Wilkerson's female companion an object and Wilkerson then handed the male an object. Shortly thereafter Wilkerson met him at a motel room and gave him the plastic bag containing a green, leafy substance. The bag was initialed by both Wilkerson and Loffi and placed in an evidence envelope. He sealed the envelope and subsequently delivered it to the Oklahoma State Bureau of Investigation.

The party stipulated that if the state chemist were

present, he would testify that he ran tests on the material submitted to him in the evidence envelope. The tests reflected that the substance was cannabis sativa, otherwise known as marijuana.

The defendant offered, from the testimony of Jack Wilkerson on cross-examination, one question and one answer which in substance reflected that the defendant did not hand the marijuana directly to Wilkerson. Defendant did not testify nor was any other evidence offered in his behalf.

The first and second propositions assert that the trial court erred in admitting into evidence the testimony of Jack Wilkerson taken at the preliminary hearing, inasmuch as Wilkerson was a paid police informer and that the State failed to prove the unavailability of this witness. We first observe that the record does not substantiate defendant's conclusion that Wilkerson was a paid informer. The preliminary hearing transcript reflects that Wilkerson at the date of the preliminary hearing was the Assistant Chief of Police at Hugo and prior thereto had other occupations including being an undercover agent. The record is void of evidence that Wilkerson was a paid informer.

As to defendant's second complaint that the State failed to prove Wilkerson's unavailability, we observe that the trial court conducted a hearing to determine if the State had exercised due diligence to locate Jack Wilkerson. The District Attorney made a detailed statement as to his unsuccessful efforts to obtain Wilkerson's attendance and was subjected to extensive cross-examination by the defendant. We are of the opinion that the evidence was sufficient to substantiate that a diligent effort had been made to locate Wilkerson and that

Wilkerson was actually unavailable. See *Tucker* v. *State*, Okl. Cr., 481 P.2d 167.

The third proposition contends that "prosecution of this case as a separate action violates every standard of fairness and justice and is a denial of defendant's due process." Defendant argues that he was alleged to have delivered contraband on four different occasions (September 30, 1972; October 1, 1972; October 7, 1972; and October 11, 1972), all occurring in the City of Durant, and that this action constituted one continuing offense and would not support four separate and distinct offenses. We disagree. in *Loane* v. *State*, Okl. Cr., 490 P.2d 759, whereupon the police officer made two buys of narcotic drugs from the defendant in less than two hours, we stated:

> "We are of the opinion that the two sales were not, in fact, a continuing transaction, and as such, constitutes two distinct offenses. We observe the differences in the time of the sales, the differences in the amounts of each sale, the differences in the number of items sold on each occasion, and the obvious completeness of each sale, that is the exchange of money, and the passing possession of the drugs."

The fourth proposition asserts that the trial court committed error by granting a continuance on the condition that defendant stipulate to the State chemist's report. The record reflects that on May 15, 1973, defendant and his counsel of record, Mr. James Bradley, appeared for hearing on a motion to strike. The motion was overruled and defendant's attorney requested a continuance. The State objected to the continuance because the State Chemist would be unavailable except on the day the cause was set for trial. The continuance was

denied when defendant's attorney refused to stipulate to the chemist's report. On May 21, defendant appeared for trial with Mr. Bradley as counsel and Mr. Frasier as co-counsel. Mr. Frasier informed the court that he had just been retained to associate with Mr. Bradley and requested a continuance on that basis. The District Attorney announced ready for trial and objected to the continuance because of the difficulty in obtaining the testimony of the chemist. The trial court advised Mr. Frasier that he would grant a continuance if he would stipulate to the chemist's report. Mr. Frasier agreed to the stipulation and the case was continued until May 31. On May 31, defendant appeared with his two attorneys and a further motion for continuance was presented which was denied by the trial court.

We are of the opinion that the trial court did not abuse its discretion. in *McCormick* v. *State*, Okl. Cr., 279 P.2d 359, we stated in the second and third Syllabus:

> "Continuances are matters controlled by statute, or within the trial court's sound discretion, and absence of counsel is not a statutory ground but is a matter within the trial court's discretion.
>
> "It is not error to overrule defendant's motion for continuance on the ground of the absence of leading counsel where the defendant is duly represented by his other counsel, able and experienced lawyers particularly where the record shows that defendant was not thus deprived of making substantial defense to the charge and especially where it appears that the alleged leading counsel did not appear of record in the case until the day before trial."

The fifth proposition asserts that the trial court committed reversible error by denying defendant's re-

quest for a change of venue. The record reflects that defendant complied with the provisions of 22 O.S., §561, by submitting with his petition the affidavits of three county residents which stated that the states of minds of the inhabitants of Bryan County were so prejudicial against the defendant that a fair and impartial trial could not be hand in the county. The District Attorney did not submit counter-affidavits, but rather requested permission to examine the affiants in open court. The trial court elected to take the motion under advisement stating:

> "Well, the Court will take this position on the matter -- the affidavits, standing alone, are not sufficient to sustain Motion for a Change of Venue. However, as the Court well knows, this defendant has been tried twice in this court since last November, and it could well be that a cross section, as we have for a jury, here, today, might reflect that he is entitled to a change of venue. And I am not going to pass on the motion until such time as we examine the prospective jurors, and then if it is determined that a sufficient number of them have a pre-conceived idea of what the outcome of the matter should be, then I will grant the change of venue. Otherwise, why I will overrule it." (Tr. 22)

We are of the opinion that the trial court acted well within its sound discretion. In *Rucker* v.*State*, 88 Okl. Cr. 15, 195 P.2d 299, we stated in the Syllabus:

> "The granting or refusing of a change of venue is a matter resting within the sound discretion of the trial court to be disposed of in furtherance of substantial justice; and action of trial court will not be disturbed on appeal, unless there is an abuse of discretion.

"An 'abuse of discretion' by the court in passing on a motion for change of venue means a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented in support of and against the application.

"The showing made in support of application for change of venue was not so persuasive as to require that it be granted, although no counter affidavits were adduced by the state to resist it.

"The ease with which a jury was obtained and qualified on their voir dire to try the cause, before the application for change of venue was denied, was of probative force to show that a change of venue was not necessary to insure the defendant a fair trial.

"It is not an abuse of discretion to deny a change of venue where the subsequent proceedceedings show that there was no difficulty in securing a fair and impartial trial."

The final proposition contends that the trial court erred in overruling the defendant's demurrer to the State's evidence. From the foregoing statement of facts, we are of the opinion that the State's evidence was sufficient to submit the question of defendant's guilt to the jury. The judgment and sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT,
BRYAN COUNTY, OKLAHOMA,
HONORABLE ALAN B. McPHERON, JUDGE,

RONNIE HAROLD DISHEROON, appellant, was convicted for the offense of Unlawful Delivery of Marijuana, his punishment was fixed at ten (10) years imprisonment an

a fine of five thousand dollars ($5,000), and he appeals. Judgment and sentence is **AFFIRMED**.

THOMAS DEE FRASIER,
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Attorney for Appellant,

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JAMES L. SWARTZ, ASST. ATTY. GEN.,
STAN CHATMAN, LEGAL INTERN,
Attorneys for Appellee.

OPINION BY BUSSEY, J.
BLISS, P. J., CONCURS
BRETT, J., DISSENTS

BRETT, J., DISSENTS: I respectfully dissent to this decision for the same reasons stated in my dissent to *Disheroon* v. *State*, Okl. Cr., 518 P.2d 892 (1974), F-73-305.

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

Filed September 17, 1973

RONNIE DISHEROON,
Appellant,

vs.

THE STATE OF OKLAHOMA,
Appellee.

OPINION

BLISS, Presiding Judge:

In the District Court of Bryan County, Case No. CRF-72-128, appellant, Ronnie Disheroon, hereinafter referred to as defendant, was charged, tried and convicted for the offense of Unlawful Delivery of a Controlled Dangerous Substance, Phencyclidine (PCP). His punishment was fixed at ten (10) years imprisonment. From that judgment and sentence, defendant attempted an appeal to this Court in Case No. F-73-104, which was dismissed for jurisdictionally fatal defect. Thereafter, defendant filed his application for post-conviction relief in the District Court of Bryan County. From the District Court's order denying post-conviction relief, defendant has perfected a timely appeal to this Court.

At the trial, the testimony of Cary Thurman and Jack Wilkerson, acting undercover agents for the Okla-

homa State Bureau of Investigation, revealed that at approximately 5:30 p.m., October 7, 1972, Wilkerson and Thurman met co-defendant James Davis at the 109 Club located in Durant, Oklahoma. After a conversation in which Davis informed Thurman and Wilkerson he could obtain a quantity of "THC" for them and that he would sell it to them, Davis, Wilkerson and Thurman drove to a residence located in Durant at the rear of 721 South Ninth Street. Upon arrival, Davis walked to the residence. Davis was met at the door by defendant. After a short discussion between Davis and defendant at the door of the residence, Davis walked back to the vehicle in which the officers were located. Davis asked the pair if they would be interested in a purchase of THC. They replied in the affirmative and Davis returned to the area where Disheroon was standing. Disheroon walked to the side of a nearby residence and obtained a container and delivered it to Davis. Davis and Disheroon walked to the vehicle and Davis delivered five (5) capsules, requesting two dollars and fifty cents ($2.50) per capsule as the purchase price. In exchange for the capsules, State's Exhibit 1, Thurman delivered twelve dollars and fifty ($12.50) to Davis. Thurman stated he observed Davis deliver the money to Disheroon. Later that evening, thurman testified that in the presence of Wilkerson he delivered State's Exhibit 1 to Ed Loffi.

Ed Loffi, of the Oklahoma Bureau of Investigation, testified that on the above date he surveilled Wilkerson, Thurman and Davis in the above matter. Loffi further stated later that evening he received State's Exhibit 1 and sealed it in an Oklahoma State Bureau of Investigation evidence envelope and delivered the envelope to the Oklahoma State Bureau of Investigation chemist.

John McAuliff testified he was the Oklahoma State Bureau of Investigation chemist and his test revealed State's Exhibit 1 contained a substance identified as Phencyclidine, a tranquilizer used in veterinary medicine.

Thereafter, the State rested.

The defense rested without the presentation of evidence.

Defense counsel asserts in his first proposition of error that the evidence is insufficient to prove the necessary intent to deliver a controlled dangerous substance. In his second proposition, it is submitted defendant was entrapped into the commission of the offense. These two assignments of error are interrelated as the defense for entrapment is generally an affirmative assertion by defendant the intent to commit the act originated with a government officer. *McCart* v. *State*, Okl. Cr., 435 P.2d 419 (1967). Generally stated entrapment can exist only as a matter of law upon undisputed facts sufficient to establish the defense. *Riddle* v. *State*, Okl. Cr., 373 P.2d 832 (1962). Defense counsel did not designate the instructions given at the trial. We do observe, however, from arguments that the jury was instructed on the defense of entrapment. In the instant case, entrapment could not be decided as a question of law upon sufficient undisputed facts as the defense did not present evidence on this question. The only evidence presented regarding this defense was raised by defense counsel on cross-examination of State's witnesses. A careful study of both direct and cross-examination of State's witnesses does not reveal uncontroverted evidence of entrapment. Quite to the contrary, the evidence regarding the defense of entrapment is controverted and the question was properly submitted to the jury for its determination. *Kissick* v.

State, Okl. Cr., 504 P.2d 889 (1972). As we have repeatedly held, we will not invade the jury's province on the jury's resolution of a conflict in the evidence. *Williams* v. *State*, Okl. Cr., 473 P.2d 248 (1970). We therefore, find this proposition to be without merit.

Defense counsel submits in his next proposition that five members of the jury on the day before defendant's trial commenced unanimously rendered a conviction for a violation of the Controlled Dangerous Substances Act. Defense counsel asserts these five members deciding and rendering such a conviction on the day prior to defendant's trial is per se evidence of prejudice of those five members of the jury. With counsel's contention we cannot agree. We have carefully studied those sections of the voir dire examination which are included in the record and relate to the voir dire of those jurors counsel asserts were prejudiced. The record of counsel's examination of those jurors is wholly insufficient to support excusing those jurors for cause. Since the record does not support counsel's assignment of prejudice, we find this proposition to be without merit without further elaborating upon it in detail.

Counsel further asserts chain of custody in the handling of the contraband was not properly established as there is a conflict in the evidence between the evidence at preliminary hearing and the evidence a trial regarding whether it was Agent Wilkerson or Agent Thurman who delivered the contraband to Agent Loffi, the agent who ultimately delivered the contraband to the Oklahoma State Bureau of Investigation. We note that this conflict was presented to the jury by defense counsel in his cross-examination. We further note that both Agent Thurman and Agent Wilkerson remained in each others presence from the time the contraband was

delivered to them by defendant and their delivery of the contraband to Agent Loffi. Although there is some conflict in the evidence as to who actually made the delivery, the chain of custody is virtually unbroken as both of the above agents remained in each others presence from the time the contraband was taken into custody until it was delivered to Agent Loffi.

In *Trantham* v. *State*, Okl. Cr., 508 P.2d 1104 (1937), this Court adopted the language of *Wagner* v. *Osborn*, 225 Cal.App.2d 36, 37 Cal.Rptr. 27 (1964) which states as follows:

> "It is true that the party offering demonstrative evidence must show to the satisfaction of the trial court that in reasonable certainty there had been no alteration of or tampering with the exhibit. (People v. Riser, 47 Cal.2d 566, 305 P.2d 1.) This burden, however, is not so absolute that all possibility of alteration must be negated. Even where there may be the barest speculation that tampering could have occurred, it is proper to admit the evidence and let what doubt there may be go to its weight. (People v. Riser, supra; see also People v. Lugo, 203 Cal. App.2d 772, 21 Cal.Rptr. 871; People v. Barquera, 208 Cal.App.2d 104, 25 Cal.Rptr. 45.) Although in the case at bench all persons who handled the envelope containing the specimen were not called as witnesses, the chain of possession was nevertheless substantially established, and the proof adequate to sustain the foundation for admissibility."

It is this Court's opinion that the above circumstance involves a situation in which the question more properly refers to the weight to be given the evidence by the jury rather than its admissibility. For this reason we find defense counsel's proposition to be without merit as

there has not been a significant break in the chain of custody which would render this evidence inadmissible.

Defense counsel next contends he was prejudiced by adverse pretrial publicity. Further, counsel submits the trial court erred in allowing the State to read a portion of the testimony received at the preliminary hearing as the State did not establish they had used due diligence in attempting to present this witness for trial. We note counsel did not submit authority in support of these contentions. This Court has repeatedly held we will not search the books for authorities to support defendant's arguments on appeal. *Sanderfur* v. *State*, Okl. Cr., 461 P.2d 954 (1969). Since counsel did not support these contentions with authority, we deem them to be without merit. The matter in which the evidence was presented at trial did not deprive defendant of his right to be *confronted by his accusors.* At preliminary hearing a complete adversary proceeding was donducted in regard to this *witness'* testimony. *A full cross-examination, in presence of jury*, of the witness was conducted by the same defense counsel that handled defendant's trial. We therefore find this proposition to be without merit.

Next, defense counsel contends the Controlled Dangerous Substance Act is unconstitutional as it denies equal protection of the law in denying drug sale offenders probation treatment. This issue was laid to rest in the case of *Black* v. *State*, Okl. Cr., 509 P.2d 941 (1973) wherein this Court stated:

> "The defendant argues that the section is unconstitutional and that Legislature has exceeded its constitutionally limited powers by invading the judicial domain, that the denial of the possibility of probation constitutes cruel and unusual punishment and violates due process and equal

> protection of the laws. We are of the opinion that the Legislature properly exercised its power to prohibit suspension of a sentence in a given case as an inherent part of its power to prescribe punishment for the acts which it has prohibited as criminal."

In light of *Black*, supra, we find this assignment of error to be without merit.

Next, defense counsel submits the evidence is not legally sufficient to support the jury's verdict and establish proof beyond a reasonable doubt of defendant's guilt. It is this Court's opinion the evidence is legally sufficient to support the jury's verdict. For a case closely in point see *United States* v. *Pentado*, 463 F.2d 355 (1972) at page 362. For this reason we find this proposition to be without merit.

In defense counsel's final proposition, it is asserted this Court should review the punishment assessed by the jury as it is cruel and unusual. The penalty is not an unlawful penalty and does not shock this Court's conscience. Consequently, there are no grounds for modification of this sentence. See *Jackson* v. *State*, Okl. Cr., 494 P.2d 358 (1972).

AN APPEAL FROM THE DISTRICT COURT
OF BRYAN COUNTY, OKLAHOMA,
HONORABLE ALAN B. McPHERON, JUDGE,

RONNIE DISHEROON, appellant, was convicted for the offense of Unlawful Delivery of a Controlled Dangerous Substance, his punishment was fixed at ten (10) years imprisonment, and from the District Court's denial of

post-conviction relief, makes timely appeal to this Court. The judgment and sentence is **AFFIRMED.**

JAMES O. BRALY,
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OPINION BY BLISS, P. J.
BUSSEY, J., CONCURS
BRETT, J., CONCURS IN PART, DISSENTS IN PART

BRETT, J.: Concurs in part, and dissents in part.

I agree that this conviction is sustained by sufficient evidence; and that the defense of entrapment was not established; but, I disagree with the reference to *Black* v. *State*, supra, and refer to my dissent to that decision. There is no doubt in my mind that the legislature invaded the judiciary when the legislative act purports to prohibit the suspension of a sentence under the Controlled Dangerous Substance Act. Therefore, I dissent to the reference to *Black* v. *State*, supra.